TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 641.

JOHN R. BUCHSER, APPELLANT,

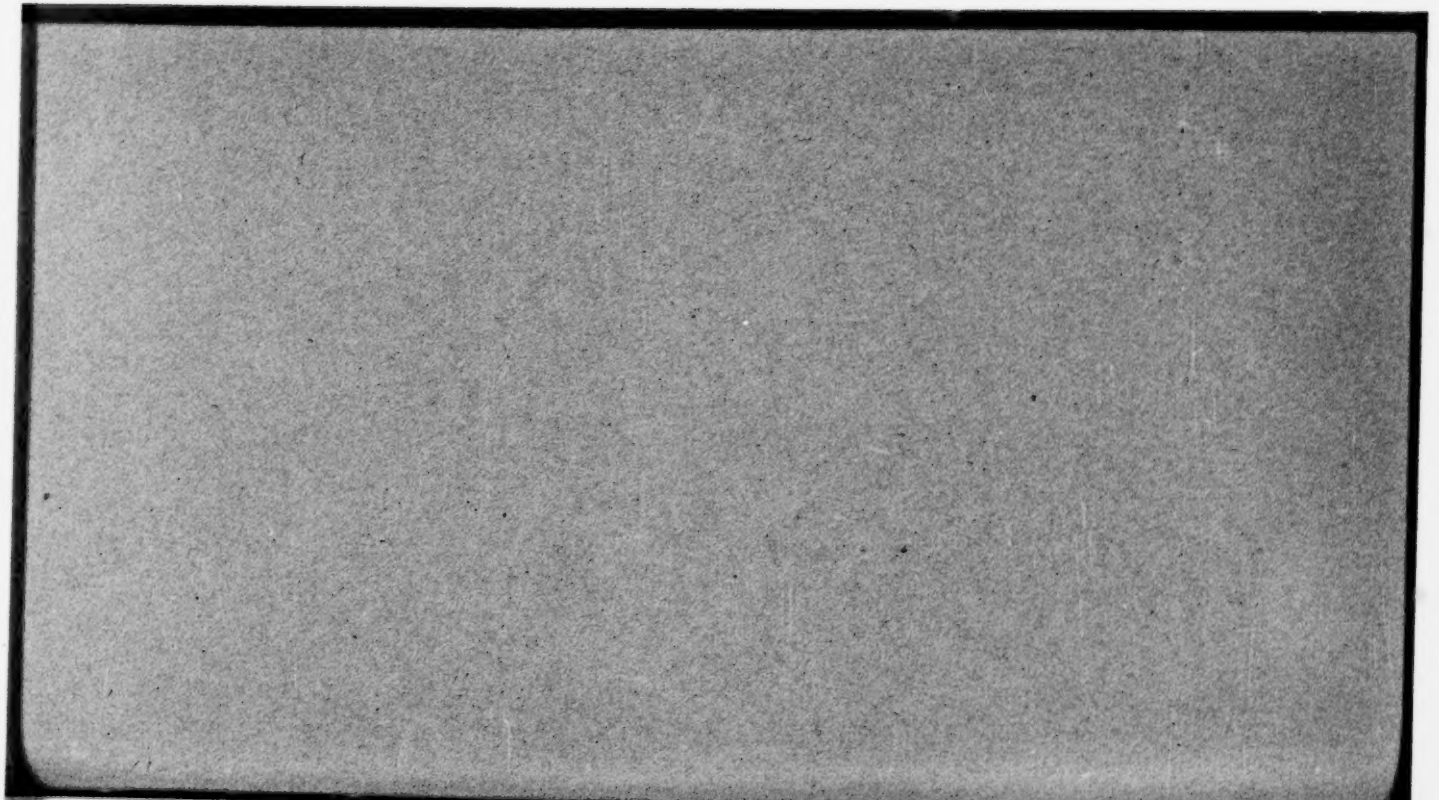
vs.

ANNIE BUCHSER AND W. W. ZENT, AS GUARDIAN AD LITEM FOR HANS R. BUCHSER, ROLAND H. BUCHSER, AND HILLMAN A. BUCHSER, MINORS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JULY 14, 1913.

(23,792)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 14, 1913.

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Received Jun- 17, 1912. F. D. Monckton, Clerk.
Filed Jul- 1, 1912. Frank D. Monckton, Clerk.

b United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division

1 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Names and Addresses of Solicitors of Record.

David Herman, Esquire, No. 518 Hyde Building, Spokane, Washington, and Oscar Cain, Esquire, Rookery Building, Spokane, Washington, Solicitors for the Complainant.

tioned. That the said Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser are minors, being respectfully sixteen (16), ten (10) and eight (8) years of age.

VIII.

That the defendants above mentioned claim an undivided one-half interest in and to all the last property above described, by and through their mother, Annie Buchser, deceased, alleging the said premises to have been the community property of this orator and their said mother. That in truth and fact the said premises are the separate property of this orator.

Wherefore, your orator prays that the defendants may be required to set forth their claims; that all adverse claims herein and of said defendants may be determined; that said defendants be forever barred from all claims in and to any estate of inheritance or freehold in the said property above described; that your orator be awarded his costs herein, and such other and further relief as may seem fit and proper.

6 And, may it please your Honors, to grant unto your orator, the writ of subpœna against the above named defendants, and each of them, commanding them to appear in this Court at some certain day to be therein named and to answer the premises and abide by and perform such decree as may be passed therein.

(Signed) DAVID HERMAN,
Solicitor for Plaintiff.

STATE OF WASHINGTON,
County of Spokane, ss:

John R. Buchser, being first duly sworn on oath, says: He is the plaintiff in the above entitled Bill; that he has read the same, knows the contents thereof and the same is true, except as to matters stated upon information and belief and as to those matters he believes the same to be true.

(Signed) JOHN R. BUCHSER.

Subscribed and sworn to before me this 7th day of November, 1911.

[SEAL.] (Signed) DAVID HERMAN,
Notary Public, Residing at Spokane, Washington.

Endorsements: Bill of Complaint in Equity. Filed November 9, 1911. Frank C. Nash, Clerk.

7 District Court of the United States, Ninth Judicial Circuit, Eastern District of Washington. In Equity.

JOHN R. BUCHSER, Complainant,
vs.
ANNIE M. BUCHSER et al., Defendants.

Demurrer.

The Demurrer of Annie M. Buchser, One of the Defendants, to the Bill of Complaint of John R. Buchser.

This defendant, by protestation, not confessing nor acknowledging all or any of the matters and things in the said Bill of Complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to the said Bill, and for cause of demurrer shows:

That the complainant has not in and by the said Bill made or stated such a case as entitles him in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said Bill or any such matters.

And for a further cause of demurrer, this defendant shows that the complainant is not entitled to sustain said Bill for the reason that he has a full, complete and adequate remedy at law.

Wherefore, this defendant demurs to the said Bill, and to all matters and things therein contained, and prays the judgment of this Honorable Court, whether she shall be compelled to make
8 any further or other answer thereto, and prays to be dismissed with her reasonable costs in this behalf sustained.

(Signed) JOHN SALISBURY,
Solicitor for Defendant.

I certify, that in my belief, the foregoing demurrer of Annie M. Buchser, to the Bill of Complaint of John R. Buchser, is well founded in law, and proper to be filed in the above cause.

(Signed) JOHN SALISBURY,
Solicitor for Defendant.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit, Eastern District of Washington, ss:

Annie M. Buchser, defendant, on oath says: That she has read the foregoing demurrer to the Bill of Complaint of John R. Buchser, in this suit, and that the same is not interposed for the purpose of delaying the said suit or other proceedings therein.

(Signed) ANNIE M. BUCHSER.

Subscribed and sworn to before me this 30th day of December, A. D. 1911.

[SEAL.] (Signed) C. D. ROBINSON,
Notary Public for Washington, Residing at Spokane.

Endorsements: Demurrer of defendant, Annie M. Buchser, to Bill of Complaint. Filed January 24, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

9 In the United States Circuit Court, for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant.

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE H. Buchser, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, Defendants.

Demurrer.

Comes now W. W. Zent as guardian ad litem of Hans R., Roland H. and Hillman A. Buchser, and demurs to the complainant's Bill herein, and alleges:

I.

That said Bill does not state facts sufficient to constitute a cause of action against said defendants.

II.

That the Court has no jurisdiction of said defendants or the subject matter of the action.

(Signed) W. W. ZENT,
Guardian ad Litem as Aforesaid.

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, attorney and counsellor at law, admitted to practice in the above entitled Court, do hereby certify that, in my opinion, the above and foregoing Demurrer is well founded in point of law.

(Signed) W. W. ZENT,
Attorney as Aforesaid.

10 STATE OF WASHINGTON,
County of Spokane, ss:

W. W. Zent, being first duly sworn, on oath says: That he is the duly appointed and acting guardian ad litem in the above entitled case of the defendants Hans R., Roland H. and Hillman A. Buchser, minors; that the foregoing demurrer is interposed in their behalf, and the same is not interposed for delay.

(Signed) W. W. ZENT.

Subscribed and sworn to before me this 24th day of January, 1912.

[SEAL.] (Signed) J. E. McANDREW,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

Endorsements: Service of above demurrer accepted this 24th day of January, 1912. (Signed) John Salisbury, Attorney for Annie Buchser. Demurrer of Guardian *ad* Litem to Bill of Complaint. Filed January 24, 1912. W. H. Hare, Clerk, by F. C. Nash, Deputy.

11 In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,

—.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, Defendants.

Opinion.

David Herman, for Complainant.
W. W. Zent and John Salisbury, for Defendants.

Rudkin, District Judge. This is a suit in equity to quiet title. It appears from the Bill of Complaint, that the complainant and one Annie Morss intermarried in the State of California in the year 1887; that on the 22nd day of June, 1897, the complainant made settlement on the lands in controversy, under the homestead laws of the United States; that his homestead entry was filed for record on the 7th day of September, 1898; final proof made October 22, 1902; letters patent issued December 17, 1903; that the complainant's wife died September 29, 1911; that the defendants are her children and heirs at law, and claim, without right, some title or interest in the lands in controversy, as such children and heirs.

Demurrers have been interposed to the Bill of Complaint on the grounds, first, that the Bill does not state facts sufficient to entitle the complainant to the relief prayed for, or any relief whatever; second that the complainant has an adequate remedy at law; and, third, that this Court is without jurisdiction in the premises.

12

That land acquired under the homestead laws of the United States is acquired by purchase, within the intent and meaning of the community property laws of the State of Washington, and is therefore community property, has been affirmed and reaffirmed by the Supreme Court of the state.

Kromer v. Friday, 10 Wash., 621.
Ahern v. Ahern, 31 Wash., 334.
Cox v. Tompkinson, 39 Wash., 70.
Hall v. Hall, 41 Wash., 186.
Cunningham v. Krutz, 41 Wash., 190.
Kreig v. Lewis, 56 Wash., 196.

The complainant frankly concedes that he is foreclosed by the decisions of the State Court, but earnestly insists that these decisions

fail to give full force and effect to the paramount laws of the United States. In support of this contention he relies largely on such cases as Hall v. Russell, 101 U. S., 503; Bernier v. Bernier, 147 U. S., 242, and M'Cune v. Essig, 199 U. S., 382.

In the Hall case the Court held that where a claimant under the Oregon Donation Act died before the completion of his four consecutive years of residence and cultivation, his heirs at law, including his widow, succeeded to his rights, under the provisions of Section 8 of the Donation Act, and that they took as grantees from the government, not as heirs of the deceased entrymen; or, in the language of the Court:

"Their title to the land was to come, not from their deceased ancestors, but from the United States. The title, itt is true,
13 was granted to them by reason of the possessory rights of their ancestors, but from the United States. The title, it is true, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees."

In the Bernier case it was held that upon the death of an entryman under the homestead law, before perfecting his entry, leaving no widow, the right to complete the proof and acquire the patent passed to all his children equally, under Section 2291 of the Revised Statutes, and not to the minor children only, under the next succeeding section.

In the M'Cune case it was held that upon the death of the homesteader before final proof, the right to complete the proof and obtain the patent passed to the surviving widow, under the express provisions of the homestead law, and not to his widow and child under the community property laws of the state. The reason upon which these decisions are founded is obvious. Under the donation and homestead laws the land is granted to the entryman upon compliance with certain conditions subsequent, and, if he should die before a compliance with these conditions, his rights would lapse or die with him, unless Congress provided otherwise. Congress has provided otherwise and its provisions must necessarily supersede all state laws on the same subject, because the laws of the United States enacted in pursuance of the Constitution are the supreme law of the land. The application of these decisions to the case at bar is not apparent. Congress has placed no limitations or restrictions on titles acquired under the homestead laws, except the single
14 one that lands so acquired shall in no event become liable to the satisfaction of any debt contracted prior to the issuance of patent therefor.

Section 2296, Revised Statutes.

Beyond this prohibition there is nothing in the laws of Congress indicating in the remotest way that lands acquired in the several states under the homestead and other settlement laws should be held by a different tenure or subject to different rules than other lands in private ownership. Congress has never concerned itself with purely local and domestic relations such as the interest a wife shall have in property acquired by her husband either before or during the existence of the marital relation. The rule so often announced by

the State Supreme Court has become a settled rule of property and many titles depend upon its maintenance. To overrule these cases at this late day would, in the language of the Court in Connecticut Mut. Life Ins. Co. v. New York etc. R. Co., 25 Conn., 265, "invite a system of litigation more portentous than our jurisprudence has yet known." If these titles are to be disturbed at all it should only be for the most cogent reasons and by a court of last resort. The demurrers are therefore sustained.

Endorsements: Opinion sustaining demurrers to Bill of Complaint. Filed April 1st, 1912. W. H. Hare, Clerk, by F. C. Nash, Deputy.

15 In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Order.

The demurrers of the defendant, Annie Buchser, and W. W. Zent, Esq., guardian ad litem, for Hans R., Roland H. and Hillman A. Buchser, minor defendants, above mentioned, to the complainant's Bill herein, having been duly argued and submitted, and the Court being duly advised in the premises, it is ordered that the said demurrers be and the same are hereby sustained, on the ground that the said Bill does not state facts sufficient to constitute a cause of action and does not entitle complainant to any relief as against said defendants, and overruled as to the other grounds mentioned in the said demurrers, to which ruling complainant excepts and exception is allowed.

Dated April 29, 1912.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Service of within order by copy admitted this — day of April, 1912. (Signed) John Salisbury, Attorney for
16 Annie Buchser. Order sustaining demurrer to Bill of Complaint. (Signed) W. W. Zent, Guardian ad Litem for Hans. R. Buchser et al. Filed April 29, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Decree.

This cause came on regularly for hearing on Complainant's Motion for a Decree Pro Confesso against the defendants, John W. Morss, Fred T. Morss and Alfred G. Morss, and on the Motion of the defendant, Annie Buchser and W. W. Zent, Esquire, guardian ad litem for the defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser on their demurrers to the Complainant's Bill herein:

It appearing to the Court that the Bill in the above entitled cause was filed in this Court on the 9th day of November, A. D. 1911, and that the said defendants, John W. Morss, Fred T. Morss and
17 Alfred G. Morss, appeared herein and filed their respective pleas pro confesso on the 24th day of November, 1911, now on file herein, and that an Order taking the Bill as confessed was duly entered in the Order Book as of the 24th day of November, 1911, in the office of the Clerk of the Court, and no proceeding has been taken by either of said defendants since the entry of said Order and more than thirty (30) days has elapsed since the date of the Order of Pro Confesso against said defendants. It is hereby ordered, adjudged and decreed That the complainant have a Decree as prayed for in his Bill herein against the defendants, John W. Morss, Fred T. Morss and Alfred G. Morss, and each and all of them: that all adverse claims of the defendants, and each of them, and of all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the complainant be and he is hereby declared to be the true and lawful owner of the lands described in the Bill and hereinafter set forth, and every part and parcel thereof as against the said three defendants mentioned and that his title thereto is adjudged to be quieted against all claims, demands or pretentions of the said three defendants, or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows: The East half (E. ½) of the Northeast quarter (N. E. ¼), the Southwest quarter (S. W. ¼) of the Northeast quarter (N. E. ¼) and the Northeast quarter (N. E. ¼) of the Southeast (S. E. ¼)
18 quarter of Section Twenty (20), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M., and the

West half (W. ½) of the Northwest quarter (N. W. ¼) of Section Twenty-one (21), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M.

And the demurrers of the defendant, Annie Buchser, and W. W. Zent, Esquire, guardian ad litem for the minor defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, having been duly argued and submitted, David Herman, Esquire, appearing for complainant, John R. Buchser; John Salisbury, Esq., appearing for defendant, Annie Buchser, and W. W. Zent, Esquire, Guardian ad Litem for the said minor defendants, appearing in person, and the Court having heretofore rendered its opinion and decision sustaining the said demurrers, whereupon the complainant elected to stand on his said Bill and plead no further, it is further ordered, adjudged and decreed That the complainant is not entitled to any relief as against the said defendant, Annie Buchser, and the minor defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser (represented by the Guardian ad Litem, W. W. Zent, Esq.: that complainant's Bill filed herein be and the same is hereby dismissed as against the said defendants and that the said defendants do have and recover their costs herein against the said complainant, taxed as follows: Annie Buchser, Fourteen and 10-100 Dollars, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser fees of guardian ad litem allowed hereby, Twenty-five Dollars.

19 Dated May 1st, 1912.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Decree. Filed May 1st, 1912. W. H. Hare, Clerk, by F. C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE Buchser, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, Defendants.

Assignment of Errors.

And now, on this 2nd day of May, A. D. 1912, came the complainant by his solicitor, David Herman, and says, that the Decree entered in the above cause on the 1st day of May, A. D. 1912, on the demurrers of the defendant, Annie Buchser, and W. W. Zent, Esq., guardian ad litem for the minor defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, is erroneous and unjust to plaintiff.

First. Because the Honorable Court erred in holding that the

community property laws of the State of Washington gov-
20 erned and determined the nature of the title of the land acquired from the United States by an entryman under its homestead laws.

Second. Because the Honorable Court erred in holding that the homestead, acquired by an entryman under the laws of the United States pertaining to the entry, settlement and acquisition of homesteads, was not the separate property of the entryman.

Third. Because the Honorable Court erred in holding that the title of John R. Buchser, complainant and appellant herein, to the East half (E. ½) of the Northeast quarter (N. E. ¼), southwest quarter (S. W. ¼) of the Northeast quarter (N. E. ¼) and the northeast quarter of the southeast quarter (S. E. ¼) of Section Twenty (20), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M., acquired by him from the United States under its homestead laws inured to the joint benefit of the said John R. Buchser and his deceased wife, Annie Buchser, and of the community existing between them, and refused to hold that the said land was the sole and separate property of the said John R. Buchser.

Fourth. Because the Honorable Court erred in holding that the title of John R. Buchser, complainant and appellant herein, to the West half (W. ½) of the Northwest quarter (N. W. ¼) of Section Twenty-one (21), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M., acquired by him with the proceeds of the sale of timber on the land described in the preceding paragraph, after he had procured title to the land described in the said section,
inured to the joint benefit of the said John R. Buchser and his
21 deceased wife, Annie Buchser, and of the community existing between them, and refused to hold that the said land was the sole and separate property of the said John R. Buchser.

Wherefore, the complainant prays that the said Decree be reversed and the District Court be directed to overrule the demurrers above mentioned, to adjudge the lands and premises above set forth to be the sole and separate property of the said John R. Buchser and to grant such other and further relief as may be meet and proper.

(Signed) DAVID HERMAN,
Solicitor for John R. Buchser, Complainant.

Endorsements: Assignment of Error. Filed May 22nd, 1912. W. H. Hare, Clerk, by F. C. Nash, Deputy Clerk.

And Afterwards, to-wit: On the 22nd day of May, 1912, the same being the thirty-eighth day of the regular April, 1912, Term of said Court, Present: Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, Presiding, the following proceedings were had in said case, to-wit:

22 . "In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Appeal and Notice of Appeal to U. S. Circuit Court of Appeals for the Ninth Circuit.

Now, at this day, comes the complainant, John Buchser and appeals, and gives notice of appeal, herein, from the decree entered in the above-entitled cause on the 1st day of May, A. D. 1912, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit."

Entered U. S. District Court Journal, Volume 4, at page 235.

23 In the District Court of the United States for the Eastern District of Washington, Northern Division. In Equity.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE BUCHser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Petition for Appeal. Filed May 22, A. D. 1912, in the District Court of the United States for the Eastern District of Washington, Northern Division.

To the Hon. Frank H. Rudkin, District Judge, etc.:

The above named Complainant feeling himself aggrieved by the Decree made and entered in this cause on the 1st day of May, A. D. 1912, does hereby appeal from the said Decree to the Circuit Court of Appeals for the Ninth Circuit *Court* for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit *Court*, sitting at San Francisco, California.

And your Petitioner further prays that the property order touching the security to be required of him to perfect his appeal, be made.

24 (Signed) DAVID HERMAN,
Solicitor.

The Petition granted and the Appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred ($500.00) Dollars.

(Signed) FRANK H. RUDKIN,
Judge, etc.

Endorsements: Petition for Appeal and Order Allowing Appeal. Filed May 22, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE BUCHSER, HANS R. BUCHSER, ROLAND H. BUCHSER, and HILLMAN A. BUCHSER, Defendants.

Bond on Appeal.

Know all men by these presents, That we, John R. Buchser, as principal, and the Fidelity & Deposit Company of Maryland, a Corporation organized and existing under the laws of the State of Maryland, and authorized to do business in the State of Washington, as surety, acknowledge ourselves to be jointly indebted
25 to John W. Morss, Fred T. Morss, Alfred G. Morss, Annie M. Buchser, Hans R. Buchser, Roland H. Buchser, Hillman A. Buchser, and W. W. Zent, Esq., Guardian ad litem for said Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, minor defendants above named, appellees in the above cause, in the sum of Five Hundred ($500.00) Dollars, conditioned that, whereas, on the 1st day of May, A. D. 1912, in the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in that Court wherein John R. Buchser was Complainant and the said John W. Morss, Fred T. Morss, Alfred G. Morss, Annie M. Buchser, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser were defendants, numbered on the equity docket as 1590, a Decree was rendered against the said John R. Buchser, Complainant, and the said John R. Buchser having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk to reverse the said Decree, and a Citation directed to the said John W. Morss, Fred T. Morss, Alfred G. Morss, Annie M. Buchser, Hans R. Buchser, Roland H. Buchser, Hillman A. Buchser and W. W. Zent, Esq., Guardian ad Litem for the said minor defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, citing and admonishing them to be and appear at a session of the United States *said* Court of Appeals for the Ninth Circuit *Court*, to be

holden in the City of San Francisco, in the State of California, on the 22nd day of June, A. D. 1912.

26 Now, if the said John R. Buchser shall prosecute his appeal to effect and answer all costs if he fail*ed* to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) JOHN R. BUCHSER, *Principal.*
By DAVID HERMAN,
His Solicitor.

[SEAL.]
(Signed) FIDELITY & DEPOSIT CO. OF MARYLAND, *Surety.*
By E. H. BELDEN,
Its Attorney in Fact.

Attest:
PINNEY,
General Agent.

Approved the 23rd day of May, A. D. 1912.
(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Bond on Appeal. Filed May 23, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE BUCHSER, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Citation.

(Lodged Copy.)

United States of America to John W. Morss, Fred T. Morss,
27 Alfred G. Morss, Annie M. Buchser, Hans R. Buchser, Roland H. Buchser, Hillman A. Buchser and W. W. Zent, Esq., Guardian ad Litem for the minor defendants, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser:

You are hereby notified that in a certain case in equity in the District Court of the United States in and for the Eastern District of Washington, Northern Division, wherein John R. Buchser is Complainant and John W. Morss, Fred T. Morss, Alfred G. Morss, Annie M. Buchser, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser are defendants, an appeal has been allowed the 22nd day of May, A. D. 1912, therein, to the Circuit Court of Ap-

peals for the Ninth Circuit, and you are hereby cited and admonished to be and appear in said Court at San Francisco in the State of California thirty days after the date of this citation, to show cause if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, Northern Division, this the 23rd day of May, A. D. 1912.

(Signed) FRANK H. RUDKIN,
[SEAL.] *United States District Judge.*

Endorsements: Citation (Lodged Copy). Filed in the U. S. District Court for the Eastern District of Washington, May 23, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

28 In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE BUCHSER, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Præcipe.

To the Hon. W. H. Hare, Clerk of the Court above mentioned:

Please prepare, certify and have printed transcript on appeal of the following papers, pleadings and record in the above entitled cause:

1. Bill.
2. Demurrer of Annie M. Buchser.
3. Demurrer of W. W. Zent, Guardian ad Litem for Hans R. Buchser et al., minor defendants.
4. Opinion on sustaining demurrers.
5. Order sustaining demurrers.
6. Decree.
7. Assignment of errors.
8. Appeal and notice of appeal in open Court (Journal entry).
9. Petition for appeal and order of allowance of same.
10. Bond on appeal and order approving same.
11. Citation in appeal and endorsement accepting service.

29 12. Stipulation as to printed record.
13. Præcipe for transcript of record.

DAVID HERMAN,
Counsel for Complainant.

Endorsements: Præcipe for transcript of record. Filed May 27, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE BUCHSER, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Appeal from the United States District Court for Eastern District of Washington, Northern Division.

It is hereby stipulated by Counsel for Complainant and defendants in the above entitled cause, that the Clerk in making up the transcript on appeal may omit therefrom the following papers and records, to-wit:

1. Subpœna, with return of service of Nov. 18th, 1911, on defendant, Annie M. Buchser; filed Nov. 18th, 1911.

2. Subpœna, with return of service of Nov. 24th, 1911, on
30 Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, minor defendants, and John R. Buchser as guardian of said minors; filed Dec. 1, 1911.

3. Appearances, disclaimers of interest in real property set forth in bill and consent that decree be entered as prayed for, by defendants, John W. Morss, Fred T. Morss and Alfred G. Morss; filed Nov. 24th, 1911.

4. Order for decree pro confesso as to defendants, John W. Morss, Fred T. Morss and Alfred G. Morss entered and filed Nov. 24th, 1911.

5. Petition of Complainant John R. Buchser for appointment of Guardian ad Litem for Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, minor defendants; filed Jan. 22nd, 1912.

6. Order appointing W. W. Zent, Guardian ad Litem for Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, minor defendants; filed Jan. 22nd, 1912.

7. Notice of presenting decree directed by Court and acceptance of service thereof, April 30th, 1912, by John Salisbury, Attorney for Annie M. Buchser, and W. W. Zent, Guardian ad Litem for Hans R. Buchser et al.; filed May 1st, 1912.

And that an Order may be entered accordingly with the permission of the Court.

Dated May 27th, 1912.

(Signed) DAVID HERMAN,
Counsel for John R. Buchser, Appellant.

(Signed) JOHN SALISBURY,
Counsel for Annie M. Buchser, Appellee.

31 (Signed) W. W. ZENT,
Guardian ad Litem for Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Endorsements: Stipulation with respect to the record. Filed May 27, 1912. W. H. Hare, Clerk. By F. C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1590.

JOHN R. BUCHSER, Complainant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants.

Clerk's Certificate to Transcript of the Record.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 31 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled causes, as are necessary to the hearing of the appeal therein, in the
32 United States Circuit Court of Appeals, and as is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the Original Citation issued in said cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of $44.35, and that the said sum has been paid to me by David Herman, Esquire, Solicitor for the Complainant and Appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 8th day of June, 1912.

[SEAL.] W. H. HARE,
Clerk U. S. District Court for the Eastern District of Washington.

33 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

34 *Index to Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2151.

JOHN R. BUCHSER, Appellant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

35 United States Circuit Court of Appeals for the Ninth Circuit.

At a stated Term, to-wit, the October Term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Franisco, in the State of California, on Tuesday, the tenth day of September, in the year of our Lord One Thousand Nine Hundred and twelve.

Present:

The Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2151.

JOHN R. BUCHSER, Appellant,
vs.
JOHN W. MORSS et al., Appellees.

Order of Submission.

Ordered, appeal in the above-entitled cause argued by Mr. David Herman, counsel for the appellant, there being no appearance in open Court of counsel for or on behalf of the appellees, and submitted to the Court for consideration and decision.

36 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUSCHER, Complainant and Appellant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE BUCHSER Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Defendants and Appellees.

[*Opinion, U. S. Circuit Court of Appeals.*]

David Herman for the Appellant.
John Salisbury, and W. W. Zent, for the Appellees.

Before Gilbert, Ross, and Morrow, Circuit Judges.

GILBERT, *Circuit Judge:*

The appellant, who was the complainant in the court below in a suit to quiet title, alleged in his bill that in 1887 he married a widow who had three children; that in June, 1897, he and his family settled upon 160 acres of public land under the Homestead law, and that on December 17, 1903, he received the patent therefor; that with money derived from the sale of timber standing on the homestead, he purchased another 160 acres of land; that in September, 1911, his wife died, leaving surviving her the aforesaid three children, who were the parties defendant to the bill; that the
37 defendants claimed an undivided one-half interest in all of the lands described in the complaint on the ground that the same was community property of the appellant and of their mother; that in fact all of said lands were the sole and separate property of the appellant. A demurrer to the bill was sustained for want of equity, and the bill was dismissed.

The appellant's contention is that a homestead acquired by an entryman under the homestead laws of the United States is the separate property of the entryman, and that lands purchased with the proceeds of a sale of timber cut from said homestead, is likewise

his separate property. The Supreme Court of the State of Washington has uniformly held that land in that state acquired under the homestead laws of the United States is the community property of the entryman and his wife. Kromer v. Friday, 10 Wash. 621; Ahern v. Ahern, 31 Wash. 334; Cox v. Tompkinson, 39 Wash. 70; Hall v. Hall, 41 Wash. 186; Cunningham v. Krutz, 41 Wash. 190; Kreig v. Lewis, 56 Wash. 196. It is of no assistance to us to refer to Missouri, Louisiana and California cases, such as Wilkinson v. American Iron Mountain Co. 20 Mo. 122, Roquier's Heirs v. Roquier's Executors, 5 Martin N. S. 98, and Noe v. Card, 14 Cal. 577, holding that a royal grant or gift to either of the two spouses did not enter into the community of acquisitions and gains which, under the Spanish law resulted from the mere fact of marriage, for if, indeed, land acquired under the homestead or pre-emption laws of the United States is to be classed among gifts from the Government, the Supreme Court of Washington has rejected
38 the doctrine that such property may not be made community property.

But it is urged that the question is not to be determined by the law of the state, but by the law of the United States, and that the state law is powerless to control the plain provisions of the homestead laws of the United States which give the title to the homestead entryman as his separate property, and in support of that contention the appellant cites Hall v. Russell, 101 U. S. 503; Bernier v. Bernier, 147 U. S. 242; and McCune v. Essig, 199 U. S. 382. Those cases, however, do not sustain the contention. They are all cases in which the court was called upon to construe the land laws, and the rights of settlers thereunder, prior to the time when the right to the title had matured under the settlement. They have no relation to the question which is presented in this case, which is the question of the authority of a state legislature to make community property of land which has passed from the United States to the homestead entryman. In Hall v. Russell, all that was decided was that under the Donation Act of September 27, 1850, the title to the grant did not vest in the settler before the conditions had been fully performed and that an unmarried man who had settled upon a half section of public land in Oregon, and after residing thereon less than a year died, had no devisable interest in the land, and that on his death, his heirs, not by inheritance but by the terms of the Act became qualified grantees, with the right to
39 continue the residence and settlement, and to acquire title.

In Bernier v. Bernier, it was held that where a homestead entryman dies a widower and without having acquired a patent, the right to complete the proofs and acquire the patent, passes, under Statutes, Section 2291, to all his children equally. And in McCune v. Essig, it was held that upon the death of the homestead entryman before final proof, the right to complete the proof and obtain the patent was given by the homestead law to the surviving widow, and not to the widow and children under the community property laws of the State of Washington. In that case the question before the court was not one of the descent of property, but one

of the construction and application of the homestead laws of the United States, which laws expressly gave to the widow the right to complete the settlement in compliance therewith, and to receive the title. In other words, the court held that the widow became, under the facts and the law applicable thereto, the grantee of the land from the United States, and that all the right of her husband was extinguished by his death.

The principle which governs the present case is found in Wilcox v. McConnell, 13 Peters, 496-516. "We hold the true principle to be this: that whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other
40 property in the state, is subject to the state legislation; so far as that legislature is consistent with the admission that the title passed and vested according to the laws of the United States." So in Bernier v. Bernier, Page 246, the Court said: "The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim, and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate."

But counsel for appellant claim that the *courts* of decision of the Supreme Court of Washington upon this subject *has* not been uniform, but *has* been inconsistent and that that court has held mineral claims, coal lands and land acquired under the Timber and Stone Act to be separate property, citing Gardner v. Port Blakely Mill Co. 8 Wash. 1; Phoenix Min. & Mill Co. v. Scott, 20 Wash. 48; James v. James, 51 Wash. 60; and Guye v. Guye, 63 Wash. 340. But those decisions do not affect the binding force of the other decisions of that court by which it has been uniformly held that lands acquired under the homestead law are community property. The distinction in these classes of cases is based expressly upon the ground that under the homestead and pre-emption laws but one entry is allowed to a family, and it must be made by the head of the family, and the family is required to live on the land and make a certain amount of improvements thereon before final proof can be made, that those laws were framed ostensibly for the benefit of the family, that the intent of Congress in passing those acts was to induce men with families to settle upon and make their homes upon the public lands, whereas, in the case of a purchase of
41 land under the Timber and Stone Acts, no settlement or residence upon the land is required, and the entryman is required to take an oath that he has not applied to purchase the land for speculation, but for his own use and benefit, that he has not made any agreement, directly or indirectly, in any way or manner with any person, by which the title which he shall acquire will inure to the benefit of any person other than himself, and that each of the spouses may make such an entry. Whether there is inconsistency in so distinguishing the rights acquired under the different classes of the land laws is a question with which we have

nothing to do. We are controlled by the settled law of the State of Washington which, as we have seen, does not contravene any provision of the homestead law, and very justly and equitably makes the land acquired as a homestead the community property of the man and wife, who have resided upon it, and cultivated it, and done the necessary acts to acquire the title thereto.

The decree is affirmed.

[Endorsed:] Opinion. Filed Feb. 3, 1913. F. D. Monckton, Clerk.

42 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,

vs.

JOHN W. MORSS, FRED R. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Decree U. S. Circuit Court of Appeals.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Northern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed:] Decree U. S. Circuit Court of Appeals. Filed and Entered Feb. 3, 1913. F. D. Monckton, Clerk.

43 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Petition for Order Allowing and Fixing Amount of Bond on Appeal to Supreme Court U. S.

To the Honorable Edward Douglas White, Chief Justice, or to Any Associate Justice of the Supreme Court of the United States:

Now comes the appellant John R. Buchser by his solicitor and complains that in the record and proceedings, and also in the rendition of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California, in the above styled and numbered cause, on the third day of February, A. D. 1913, affirming the decree of the United States District Court for the Eastern District of Washington, Northern Division, in said cause, manifest error has intervened to the great damage of the petitioner; that the jurisdiction of the District Court of the United States for the Eastern District of Washington, Northern Division, hearing the said cause depended upon the fact that said John R. Buchser, complainant in said Court claims the East Half of the Northeast Quarter, the Southwest Quarter of the Northeast Quarter and the Northeast Quarter of the Southeast Quarter of Section Twenty (20), in Township Twenty-Eight (28) North, of Range Forty Three (43) E. W. M., entered by him as a homestead, he having received a patent therefor from the Government of the United States
44 under and in pursuance of the homestead laws thereof, and the West Half of the Northwest Quarter of Section Twenty One (21) in Township Twenty-eight (28) North, of Range Forty Three (43) E. W. M. the last mentioned tract having been purchased by him with the proceeds received by him on the sale of the timber on the first mentioned tract after he had received a patent therefor as above mentioned, as his sole and separate property, to the exclusion of any right, title or interest of John W. Morss, Fred T. Morss, Alfred G. Morss, Annie Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, heirs of Annie Buchser, deceased, wife of the said John R. Buchser at the time he secured the title to the said lands above mentioned, on the grounds that the homestead laws of the said United States and the patent received by him for the first mentioned tract gave him the separate, sole and exclusive ownership thereof, and that the last mentioned tract, having been purchased with the funds received from the sale of timber standing on the first mentioned tract, also became his separate, sole and exclusive property;

that the amount involved therein and the matter in controversy exceeds the sum of one thousand dollars besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for a supersedeas of said judgment and such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

(Signed) W. E. CULLEN AND
DAVID HERMAN,
Solicitors.

45 Appeal allowed, and bond for costs fixed in the sum of five hundred dollars, conditioned as the law directs, this the 19th day of May, A. D. 1913.

(Signed) WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Petition for order allowing and fixing amount of bond on appeal to Supreme Court U. S. Filed May 19, 1913. F. D. Monckton, Clerk.

46 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Assignment of Errors.

And now on this 19th day of May, A. D. 1913, came the appellant by his solicitor, David Herman, and says, that the Decree entered in the above cause on the 3rd day of February, A. D. 1913, on the appeal of the appellant John R. Buchser, is erroneous and unjust to the appellant.

First. Because the Honorable Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco, in the State of California, erred in affirming the Decree of the Honorable District Court for the Eastern District of Washington, Northern Division.

Second. Because the Honorable Court erred in holding that the community property laws of the State of Washington governed and determined the nature of the title of the land acquired from the United States by an entryman under its homestead laws.

Third. Because the Honorable Court erred in holding that the homestead, acquired by an entryman under the laws of the United

States pertaining to the entry, settlement and acquisition of homesteads, was not the separate property of the entryman.

Fourth. Because the Honorable Court erred in holding that the title of John R. Buchser, complainant and appellant herein,
47 to the East Half (E. ½) of the Northeast Quarter (N. E. ¼), southwest Quarter (S. W. ¼) of the Northeast Quarter (N. E. ¼) and the Northeast Quarter of the Southeast Quarter (S. E. ¼) of Section Twenty (20), in Township Twenty Eight (28) North, of Range Forty Three (43) E. W. M., acquired by him from the United States under its homestead laws inured to the joint benefit of the said John R. Buchser and his deceased wife Annie Buchser, and the community existing between them, and refused to hold that the said land was the sole and separate property of the said John R. Buchser.

Fifth. Because the Honorable Court erred in holding that the title of John R. Buchser, complainant and appellant herein, to the West Half (W. ½) of the Northwest Quarter (N. W. ¼) of Section Twenty One (21), in Township Twenty Eight (28) North, of Range Forty Three (43) E. W. M., acquired by him with the proceeds of the sale of timber on the land described in the preceding paragraph after he had procured title to the land described in the said section, inured to the joint benefit of the said John R. Buchser and his deceased wife, Annie Buchser, and of the community existing between them, and refused to hold that the said land was the sole and separate property of the said John R. Buchser.

Wherefore, the appellant prays that the Decree of the Circuit Court of Appeals for the Ninth Circuit affirming the Decree of the lower Court be reversed, that the District Court for the Eastern District of Washington, Northern Division be directed to overrule the demurrers of Annie Buchser, and W. W. Zent, Esq., Guardian Ad Litem for Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser to the bill of John R. Buchser, that the said lands be adjudged to be the sole and separate property of said John R. Buchser, and that he be granted such other and further relief as may be meet and proper.

(Signed) W. E. CULLEN,
(Signed) DAVID HERMAN,
Solicitors for John R. Buchser, Appellant.

[Endorsed:] Assignment of errors. Filed May 19, 1913. F. D. Monckton, Clerk.

48 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,

vs.

JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Bond on Appeal to Supreme Court U. S.

Know all men by these presents, That we, John R. Buchser, as principal, and the Fidelity & Deposit Company of Maryland, a Corporation organized and existing under the laws of the State of Maryland, and authorized to do business in the State of California, as surety, acknowledge ourselves to be jointly indebted to John W. Morss, Fred T. Morss, Alfred G. Morss, Annie Buchser, Hans R. Buchser, Roland H. Buchser, Hillman A. Buchser and W. W. Zent, Esq., Guardian ad litem for said Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, minor defendants above named, appellees in the above cause in the sum of Five Hundred ($500.00) Dollars, conditioned that, whereas, on the 3rd day of February, A. D. 1913, in the Circuit Court of Appeals of the United States for the Ninth Circuit, in a suit pending in that Court wherein John R. Buchser was appellant and the said John W. Morss, Fred T. Morss, Alfred G. Morss, Annie Buchser, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser were appellees, numbered on the equity docket as 2151, a Decree was rendered against the said John R. Buchser, appellant, and the said John R. Buchser having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office
49 of the Clerk to reverse the said Decree, and a Citation directed to the said John W. Morss, Fred T. Morss, Alfred G. Morss, Annie Buchser, Hans R. Buchser, Roland H. Buchser, Hillman A. Buchser and W. W. Zent, Esq., Guardian ad Litem for the said minor defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden in the City of Washington, District of Columbia on the — day of ——, A. D. 1913.

Now, if the said John R. Buchser shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) JOHN R. BUCHSER, *Principal.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
(Signed) By WALTER W. DERR,
[SEAL.] *Attorney-in-Fact.*
(Signed) C. H. BENNETT, *Surety, Agent.*

Approved the 21st day of May, A. D. 1913.
(Signed) WM. B. GILBERT, *Judge.*

[Endorsed:] Bond on Appeal to Supreme Court U. S. Filed May 21, 1913. F. D. Monckton, Clerk.

50 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Præcipe for Transcript on Appeal to Supreme Court U. S.

To the Clerk of the said Court.

SIR: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Appeals, to which will be added a Copy of the following-entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz:
2. Order of Submission;
3. Opinion;
4. Decree;
5. Petition for, Order allowing, and fixing amount of Bond on Appeal to Supreme Court U. S.;
6. Bond on Appeal to Supreme Court U. S.;
7. Assignment of Errors;
8. Præcipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;
9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S., and
10. Original Citation on Appeal to Supreme Court U. S.

(Signed) DAVID HERMAN,
Counsel for Appellant.

[Endorsed:] Due and legal service of within præcipe by copy is hereby admitted this 29th day of May, 1913.
(Signed) W. W. ZENT,
Guardian ad Litem for Hans R., Roland H. and Hillman A. Buchser, Minors.

51 STATE OF WASHINGTON,
County of Spokane, ss:

H. E. T. Herman being duly sworn, says and deposes: I am and at all times herein mentioned was a citizen of the United States

and of the State of Washington, over and above the age of twenty one (21) years, not a party to the within cause of John R. Buchser, appellant, vs. John W. Morss et al., appellees, No. 2151, nor interested therein and competent to be a witness at the trial thereof. On the 29th day of May A. D. 1913, in the City of Spokane, Spokane County, State of Washington, I duly served the within præcipe on John Salisbury, Esq., solicitor for Annie M. Buchser, defendant and appellee, then and there delivering to and leaving with him personally a full, true and correct copy of said præcipe.

(Signed) H. E. T. HERMAN.

Subscribed and sworn to before me this 29th day of May, 1913.

[NOTARIAL SEAL.] (Signed) DAVID HERMAN.
Notary Public, Residing at Spokane, Wash.

Præcipe for Transcript on Appeal to Supreme Court U. S. Filed June 2, 1913. F. D. Monckton, Clerk.

52 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2151.

JOHN R. BUCHSER, Appellant,
vs.
JOHN W. MORSS, FRED T. MORSS, ALFRED G. MORSS, ANNIE M. Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-one (51) pages, numbered from and including one (1) to and including fifty-one (51), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to præcipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this thirteenth day of June, A. D. 1913.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Annie Buchser and W. W. Zent, as Guardian ad Litem for Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Minors, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, holden at the City of San Francisco, in the State of California, wherein John R. Buchser is appellant and Annie Buchser and W. W. Zent, as guardian ad litem for Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, minors, are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, Chief Justice of the United States, this 7th day of June, in the year of our Lord one thousand nine hundred and thirteen.

WM. B. GILBERT,
Circuit Judge.

54 Service of within citation, in the cause of John R. Buchser, appellant, vs. John W. Morss et al., appellees, on appeal to the Supreme Court of the United States, is hereby accepted and acknowledged this 10th day of June, A. D. 1913.

W. W. ZENT,
Guardian ad Litem for Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Minors.

Service of within citation in the cause of John R. Buchser appellant, vs. John W. Morss et al., appellees, on appeal to the Supreme Court of the United States is hereby accepted by receipt of a copy of same this 10th of June, 1913.

JOHN SALISBURY,
Attorney for Annie Buchser, Appellee.

55 [Endorsed:] Docketed. No. 2151. U. S. Circuit Court of Appeals for the Ninth Circuit. John R. Buchser, Appellant, vs. John W. Morss, Fred T. Morss, Alfred G. Morss, Annie Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Appellees. Citation on Appeal. Filed Jun- 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. David Herman, Attorney for John R. Buchser, 518 Hyde Block, Spokane, Wash.

Endorsed on cover: File No. 23,792. U. S. Circuit Court Appeals, 9th Circuit. Term No. 641. John R. Buchser, appellant, vs. Annie Buchser and W. W. Zent, as guardian ad litem for Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, minors. Filed July 14th, 1913. File No. 23,792.

IN THE

Supreme Court

OF THE

United States

October Term, 1913.

No. 461.

JOHN R. BUCHSER,

Appellant,

vs.

ANNIE BUCHSER, and W. W. KENT, as Guardian ad Litem for RAINE R. BUCHSER, ROLAND R. BUCHSER, and HILLMAN A. BUCHSER, Minors,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF COMPLAINANT AND APPELLANT.

FRED M. BUDLEY,
W. E. CULLEN,
DAVID HERMAN,

Solicitors for Complainant and Appellant.

518 Hyde Block,
Spokane, Wash.

IN THE

Supreme Court

OF THE

United States

October Term, 1913.

No. 641.

JOHN R. BUCHSER,

Appellant,

vs.

ANNIE BUCHSER, and W. W. ZENT, as Guardian *ad Litem* for HANS R. BUCHSER, ROLAND H. BUCHSER, and HILLMAN A. BUCHSER, Minors,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF COMPLAINANT AND APPELLANT

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518 Hyde Block,
Spokane, Wash.

SUBJECT INDEX.

CASES REFERRED TO

STATEMENT OF THE CASE.

The only question involved in the case at bar is whether the homestead, granted by the federal government, is the separate property of the entryman, or the community property of himself and wife.

The appellant, John R. Buchser, brought this action against the defendants herein to quiet title to the East Half of the Northeast Quarter, the Southwest Quarter of the Northeast Quarter and the Northeast Quarter of the Southeast Quarter of Section Twenty (20), in Township Twenty-eight (28) North, of Range Forty-three (43) E., W. M., and the West Half of the Northwest Quarter of Section Twenty-one (21), in same Township and Range. (Record, pp. 2, 3 and 4.)

Appellant alleges his marriage in 1887 to one Annie Morss, a widow, and at the time mother of the defendants John W. Morss, Fred T. Morss, and Alfred G. Morss, children by a former marriage; his settlement June 22, 1897, on the East Half of the Northeast Quarter, the Southwest Quarter of the Northeast Quarter, and the Northeast Quarter of the Southeast Quarter of Section Twenty (20), in Township Twenty-eight (28) North, of Range Forty-three (43) E., W. M.; his entry of said land as a homestead September 7, 1898; his residence on and cultivation of the land as provided

by the laws of the United States relating to homesteads; final proof made and filed October 22, 1902; issuance of letters patent of the United States December 17, 1903, granting the lands above described to him in fee simple; the sale of the timber standing on the homestead and the purchase of the West Half of the Northwest Quarter of Section Twenty-one (21), in said Township Twenty-eight (28) North, of Range Forty-three (43) E., W. M., with the proceeds thereof; the value of the lands mentioned eight thousand ($8,000) dollars; the residence of appellant and his wife, Annie Buchser, on the homestead while acquiring title thereto; the death of his said wife, Annie Buchser Sept. 29, 1911, leaving all the defendants above mentioned surviving her; the minority of defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, aged sixteen (16), ten (10), and eight (9) years, respectively; defendants' claim of an undivided half interest in and to all of the lands above mentioned on the ground that the same was and is the community property of appellant and their mother, Annie Buchser, appellant's wife; and that said lands are the sole and separate property of appellant.

Defendants John W. Morss, Fred T. Morss and Alfred G. Morss appeared, disclaimed all interest in the lands described and consented to a decree as prayed for by plaintiff.

The defendant Annie Buchser, daughter of the deceased and appellant, by her solicitor, John Salisbury, Esq., demurred to the bill on the grounds that the same does not entitle appellant to any discovery or relief against said defendant, and that the appellant has a full, complete and adequate remedy at law. (Record, p. 5.)

The minor defendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser, by their duly appointed guardian *ad litem*, W. W. Zent, Esq., demurred to said bill on the grounds that the same does not state facts sufficient to constitute a cause of action against said defendants, and that the Court has no jurisdiction of said defendants or of the subject matter of the action. (Record, p. 6.)

The said demurrers were argued and submitted, whereupon the Court rendered and filed his opinion (Record, pp. 7, 8 and 9) and ordered that the said demurrers be sustained on the ground that said bill does not state facts sufficient to constitute a cause of action and does not entitle complainant to any relief as against said defendants, and be overruled as to the other grounds mentioned in the said demurrers. (Record, p. 9.)

Thereafter a decree was entered against appellant in favor of defendant Annie Buchser, and the minor de-

fendants, Hans R. Buchser, Roland H. Buchser and Hillman A. Buchser (Record, pp. 10 and 11), from which an appeal was prosecuted to the Honorable Circuit Court of Appeals; the latter Court filed its opinion (Records, pp. 20, 21, 22 and 23), holding the land involved to be the community property of appellant and his wife, and entered its decree (Record, p. 23) affirming the decree of the Hon. District Court in favor of appellees and against appellant. From this last decree appellant appeals to this Honorable Court. Record, p. 24.)

ASSIGNMENT OF ERRORS.

Complainant and appellant makes the following Assignment of Errors (Record, pp. 25 and 26):

First. Because the Honorable Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco, in the State of California, erred in affirming the Decree of the Honorable District Court for the Eastern District of Washington, Northern Division.

Second. Because the Honorable Court erred in holding that the community property laws of the State of Washington governed and determined the nature of the title of the land acquired from the United States by an entryman under its homestead laws.

Third. Because the Honorable Court erred in hold-

ing that the homestead, acquired by an entryman under the laws of the United States pertaining to the entry, settlement and acquisition of homesteads, was not the separate property of the entryman.

Fourth. Because the Honorable Court erred in holding that the title of John R. Buchser, complainant and appellant herein, to the East Half (E. ½) of the Northeast Quarter (N. E. ¼), Southwest Quarter (S. W. ¼) of the Northeast Quarter (N. E. ¼) and the Northeast Quarter (N. E. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty (20), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M., acquired by him from the United States under its homestead laws inured to the joint benefit of the said John R. Buchser and his deceased wife, Annie Buchser, and the community existing between them, and refused to hold that the said land was the sole and separate property of the said John R. Buchser.

Fifth. Because the Honorable Court erred in holding that the title of John R. Buchser, complainant and appellant herein, to the West Half (W. ½) of the Northwest Quarter (N. W. ¼) of Section Twenty-one (21), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M., acquired by him with the proceeds of the sale of timber on the land described in

the preceding paragraph after he had procured title to the land described in the said section, inured to the joint benefit of the said John R. Buchser and his deceased wife, Annie Buchser, and of the community existing between them, and refused to hold that the said land was the sole and separate property of the said John R. Buchser.

ARGUMENT.

The question involved in the discussion of the first, second, third and fourth assignments of error is whether the homestead, East Half of the Northeast Quarter, Southwest Quarter of the Northeast Quarter and the Northeast Quarter of the Southeast Quarter of Section Twenty (20), in Township Twenty-eight (28) North, of Range Forty-three (43) E. W. M., granted to appellant by the Federal government, became his separate property or the community property of himself and his wife. This will be discussed under Part I.

The fifth assignment of error will be controlled by the answer given to the preceding question, as the West Half of the Northwest Quarter of Section Twenty-one (21), same Township and Range, was acquired with the proceeds derived from the sale of timber standing on the homestead. This argument will be presented in Part II.

I.

A. The Honorable Circuit Court of Appeals erred in its opinion that the State of Washington has uniformly held grants of the Federal government under the homestead laws to be the community property of the entryman and his wife.

In the case of Bolton *et al.* vs. La Camas Water Power Co., 10 Wash. 246, 38 Pac. 1043, decided Dec. 3, 1894, it was held that the title from the government would not pass until proof of residence was made; that the title would not revert, that it vested in the entryman, and that the heirs of the wife had no interest. The homestead was considered the separate property of the entryman.

In the case of Ahern vs. Ahern, 31 Wash. 334, 71 Pac. 1023, decided March 19, 1903, the Court held that even if the wife died before patent issued still her heirs owned an undivided one-half interest in the land as soon as the title passed from the government to the entryman.

In the case of Hall vs. Hall, 41 Wash. 186, 83 Pac. 108, and Cunningham vs. Krutz, 41 Wash. 190, 83 Pac. 109, both decided Dec. 27, 1905, the Court disapproved the doctrine announced in Ahern vs. Ahern (*supra*) and held the homestead to be the separate property of the entryman. In the one case the wife was divorced and

in the other she died before patent issued.

Since the Honorable Circuit Court of Appeals rendered its decision herein, the Honorable Supreme Court of the State of Washington decided the case of Teynor et ux vs. Heible et al., 133 Pac. 1, July 1, 1913. The latter Court, answering the question whether the homestead became the separate property of the entryman, or the community property of the entryman and his then wife, frankly uses this language:

> "On the question our own cases are out of harmony. Indeed they seem incapable of being reconciled, whether considered with relation to the facts upon which they are founded or with relation to the reasons by which they are thought to be sustained."

The facts briefly stated are as follows: Peter Teynor entered the land in 1901. He was then a bachelor. January 1, 1903, he married Chloe Heible. He made final proof under the homestead laws September 12, 1906, and thereafter a patent was duly issued to him. He died intestate October 30, 1906. In the distribution of his estate the question arose whether the homestead was his separate property or the community property of himself and his wife. The Superior Court administering the estate, first held that it was the community property of the entryman and his wife, then reversed itself and held it to be his separate property, which last decision was

affirmed by the Supreme Court of the State of Washington.

The Court, reviewing its former decisions, uses the following language:

> "The arguments thought to sustain these several conclusions we shall not set forth. It is manifest, however, that no reasoning based upon principle can reconcile the first with the second group or the third with the fourth. It is the opinion of the Court now that the property in each of these groups, if nothing more appeared in the record than is shown in the opinion, should have been held to be the separate property of the entryman. In other words, the rule should be that, in all cases where the marital relation does not exist at the time of the original settlement and entry and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land. The folly of any other rule is illustrated by the case of Rogers v. Minneapolis Threshing Machine Co., 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014. This case we have placed in the second group, but it belongs under its facts in the fourth group also. In that case it will be remembered that the entryman was married at the time he made entry on the land; that his then wife died leaving issue some two years later after a continuous residence thereon; that about a year later the entryman married a second time, resided with his second wife on the property for some two years more, and made final proof and received a patent. If a community interest is impressed on the land by the fact of marriage at the time of its entry, as is held in the fourth group of cases, and if a community interest is also impressed by the fact of marriage at the time of the

making of final proof and the issuance of the patent, as is held in the first group, then this land was impressed with the interest of two distinct communities, the one in favor of the issue of the first wife, and the other in favor of the second wife. A rule that leads to such incongruous results is certainly not to be commended."

B. To allow the states to ignore federal land laws, to interpret the grants made by the federal government and designate the persons who are the beneficiaries thereof according to their own local laws, brings about the anomalous situation of citizens of the United States holding different rights under grants issued by the federal government in pursuance of the same and identical laws, simply because one happens to live in California and the other in the state of Washington. Thus California, also possessing the community property law, has uniformly held that the homestead becomes the sole and separate property of the entryman.

Noe vs. Card, 14 Cal. 577. (Leading case, Hon. Justice Field, *J.*)
Wilson vs. Castro, 31 Cal. 421.
Wood vs. Hamilton, 33 Cal. 698.
Lake vs. Lake, 52 Cal. 428.
Harris vs. Harris, 71 Cal. 314.
Morgan vs. Lones, 80 Cal. 317.

The State of Washington has been vacillating and under certain conditions holds that the homestead is not the separate property of the entryman, but the com-

munity property of himself and his wife, and that one-half of the property belongs to her or her children, even if they are by a former husband.

But we are told that the State of Washington, after title has passed, can designate the homestead as community property, and thereupon administer it in accordance with said laws. This is begging the question. The state can not do indirectly that which it is prohibited from doing directly. It cannot confiscate one-half of the entryman's grant by calling it the community property of himself and his wife, as that would be the taking of property without due process of law. If the federal government grants the homestead to the entryman himself personally, then it becomes his separate property, and not the community property of himself and his wife.

C. The rights of a grantee from the federal government present a federal question on which the decisions of the federal courts are controlling, and in the administration of the federal land laws the community system is unknown.

In the cause of the Phoenix Min. & Mill. Co. vs. Scott, 20 Wash. 48, 54 Pac. 777, the Court uses the following language:

> "It will not be doubted that it was lawful for Congress to vest the right in whomsoever it might select, and its character, as regards the question of whether

> it is community property or the separate property of the locator is fixed by the act that creates the right."

In Cunningham vs. Krutz, 41 Wash. 190, 83 Pac. 107, the Court, after referring to the cause of McCune vs. Essig, 199 U. S. 382, says:

> "There is no necessity for further reviewing the arguments of our Courts or of the federal decisions. The above decision (McCune vs. Essig) is final and conclusive that the question as to what title passed to Carlson must be resolved by the laws of the United States."

In the case of Hall vs. Hall, 41 Wash. 186, 83 Pac. 108, the Court uses the following language:

> "Furthermore, it is a well known fact that our community system is utterly ignored in the administration of the federal land laws."

Each of the three cases cited holds the grant from the government to be the separate property of the entryman and grantee.

D. Congress alone has the power to enact laws for the disposition of the lands belonging to the United States. No state can abridge that right nor interfere with the grantee's enjoyment or possession of the lands granted by the federal government.

Irvine vs. Marshall, 61 U. S. (20 How.) 558, 15 L. Ed. 994.

Gibson vs. Chouteau, 80 U. S. (13 Wall.) 92, 20 L. Ed. 534.

In the former case the Court uses the following language:

> "The authority and effect of the territorial laws of Minnesota upon subjects within the legitimate bounds or cognizance of that territorial government no person, it is presumed, will be disposed to question; but it seems equally clear that to respect the rights and interest which come not within the scope of that authority, but which are created by the Constitution and laws of the United States, imposes a duty as sacred as any which enjoins upon a State or Territory the obligation to protect and maintain whatever of power may justly belong to it. And it cannot without extravagance be supposed that to secure these proper and necessary ends the Territory should assume the power to control the acquisition or transmission of property never belonging to, and not acquired from, herself; to which, therefore, she could annex no conditions, much less conditions which might impair the interests of the citizens of every State, and of every State collectively in the Confederacy, and even of the United States, and render utterly worthless, and incapable of being disposed of, subjects in which the Territory has no legal right or property whatsoever. It can not be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has heretofore been recognized and scrupulously respected by sovereign States within

which large portions of the public lands have been comprised, and within which much of those lands is still remaining."

In the case of Gibson vs. Chouteau the Honorable Court says:

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the Legislature shall also not interfere 'with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers'."

A similar provision is contained in the enabling act admitting the State of Washington. It is as follows, Section 4:

> "Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and

to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

With the right to dispose of the public lands necessarily goes the right to protect the grants made by the federal government. A grant without that power is a nullity. If a state can take away one-half of the land granted and give it to the entryman's wife or her children, then the state, and not Congress, determines the character of the grant and the persons who receive the same. The power of Congress to grant and the right of the grantee to enjoy are reciprocal. If the grantee can not enjoy that which was granted, then Congress can not grant. In the case at bar, appellant Buchser, the entryman, married a widow with three children by a former husband. If the State, after he has obtained title, can designate his homestead as community property of himself and his wife, and distribute the same as such, then part of the land entered by the appellant and granted to him personally for his own benefit by the federal government is taken and distributed to strangers, something which is certainly not contemplated nor

sanctioned by the public land laws.

E. Section 2289 of the United States Compiled Statutes, 1901, provides that any person the head of a family, or who is twenty-one years of age, may enter one hundred and sixty acres of land.

Section 2290 of the said statutes provides as follows:

> "That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit," etc.

These two sections conclusively show that the wife has no interest in the lands entered by her husband whilst he is living.

By the terms of the first section there is no grant of any right to the wife whilst living with her husband, and the second section negatives any rights to her because the husband is required to swear that no one else has any interest in the lands entered, that he is not acting as agent for any person in making said entry, and that the same is made in good faith for the purpose of making a home for himself.

Would Congress require such an affidavit if it intended that the wife should acquire an undivided one-half interest in the lands entered? Could the husband consistently make this affidavit if his wife is to share the grant equally with him?

Section 2291 of said statutes provides that on the death of the husband the wife may receive letters patent for the land entered by the former; it is as follows:

> "No certificate, however, shall be given, or patent issued therefore, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in the case of a widow making such entry her heirs or devisee, in case of her death,

proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then in such case, he, she or they, if at the time citizens of the United States, shall be entitled to a patent as in other cases provided by law."

The right to a patent is the same, whether proof is made by the husband, the widow, his heirs, or devisees, or the heirs or devisees of the widow. The right to make the proof of residence, cultivation and non-alienation is successively granted to the several persons in the order mentioned, only in case the entryman or entrywoman has died. But necessarily the right and the title under the patent must be the same, whether acquired by the husband or by the widow.

F. A homestead acquired under the laws of the United States is the sole and separate property of the entryman. Any other conclusion is inconsistent with the clear and explicit provisions of the United States Statutes applicable to homestead entries.

Gibson vs. Chouteau, 80 U. S. (13 Wall) 92, 20 L. Ed. 534.

McCune vs. Essig, 199 U. S. 382.

In Gibson vs. Chouteau, the Hon. Justice Field uses

the following language:

> "With respect to the public domain, the Constitution vests in Congress the power of dispostion and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

In the case of McCune vs. Essig the facts are the same as in the case at bar, except that the community was dissolved. This was simply an incident enabling the widow to make the homestead entry. In that case the Honorable Court held the land to be her separate property because the statute gave it to her as such, and the fact that the community between herself and her husband was dissolved did not control nor decide the character of the title to the land, *i. e.*, whether it was separate or community property. In that case the question of the widow's title, whether community or separate property, came up after the title had passed from the federal government, the same as in the case at bar, the daughter bringing suit against the grantee of the entrywoman, and the Court held the land to be separate property.

The Supreme Court of the State of Washington, in Hall vs. Hall, 41 Wash. 186, 83 Pac. 108, uses the following language:

> "Furthermore, it is a well known fact that our community system is utterly ignored in the administration of the federal land laws. The wife is not made a party to a contest against an entry, and the husband is permitted to relinquish without the wife joining him."

Inasmuch as the federal land laws provide in the most explicit terms that the entry must be for the sole and exclusive benefit of the entryman, make him swear to that fact, and do not recognize the community property law of husband and wife, the land in controversy herein must be held to be the sole and separate property of the appellant John R. Buchser, under the authority of McCune vs. Essig, 199 U. S. 382.

G. The Honorable Circuit Court of Appeals erred in its interpretation of Wilcox v. McConnell, 13 Peters, 496-516. Appellant most respectfully submits that the said cause does not warrant the conclusion that after title has passed from the federal government, the state can take one-half of the land from the grantee and give it to his wife, by simply designating it as community property. The language of the Hon. Court in Wilcox vs. McConnell (p. 516) is as follows:

> "We hold the true principle to be this: that whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United

States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is *consistent* with the admission that the title passed and vested according to the laws of the United States."

The Court after stating that when the title had passed the property was subject to state legislation, adds "so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

The community law of the State of Washington, as interpreted by its Supreme Court, is not consistent with the admission that the title passed to and vested in the appellant according to the laws of the United States, but it is antagonistic to it. Under the acts of Congress the letters patent were issued to appellant; he received title in fee simple, and no one else has any interest in the granted lands; under the community property law the State of Washington would hold that the grant is to the community for the joint benefit of the appellant and his wife. In other words, the state would take one-half of the grant from appellant and give it to his wife.

In the case at bar there is no question of descent as the entryman, John Buchser, appellant herein, is still living. The fact that his wife died cannot affect his individual and separate property, nor give the probate Court any jurisdiction over the same.

II.

Granting that the homestead became the separate

property of appellant, then the West Half of the Northwest Quarter of Section Twenty-one (21), in Township Twenty-eight (28) North, of Range Forty-three (43) E., W. M., purchased with the proceeds he received from the sale of the timber cut on the homestead after making his proof, was also his sole and separate property.

Sec. 5915, Vol. 2, Remington & Ballinger's Codes of Washington, provides as follows:

> "Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried."

The products, issues and profits of separate property belong to the spouse owning the property.

Harris vs. Van de Venter, 17 Wash. 489, 50 Pac. 50.

Elliot vs. Hawley, 34 Wash. 585, 76 Pac. 93.

In re Pepper's Estate, 112 Pac. 62 (Cal.).

Appellant respectfully submits that the Honorable Circuit Court of Appeals erred, that its decree affirming the decree of the lower Court be reversed, and the cause remanded for further proceedings.

FRED M. DUDLEY,
W. E. CULLEN,
DAVID HERMAN,
Solicitors for Complainant and Appellant.

IN THE

Supreme Court

OF THE

United States

October Term—1913.

No. 641.

JOHN B. BUCHSER,

Appellant,

vs.

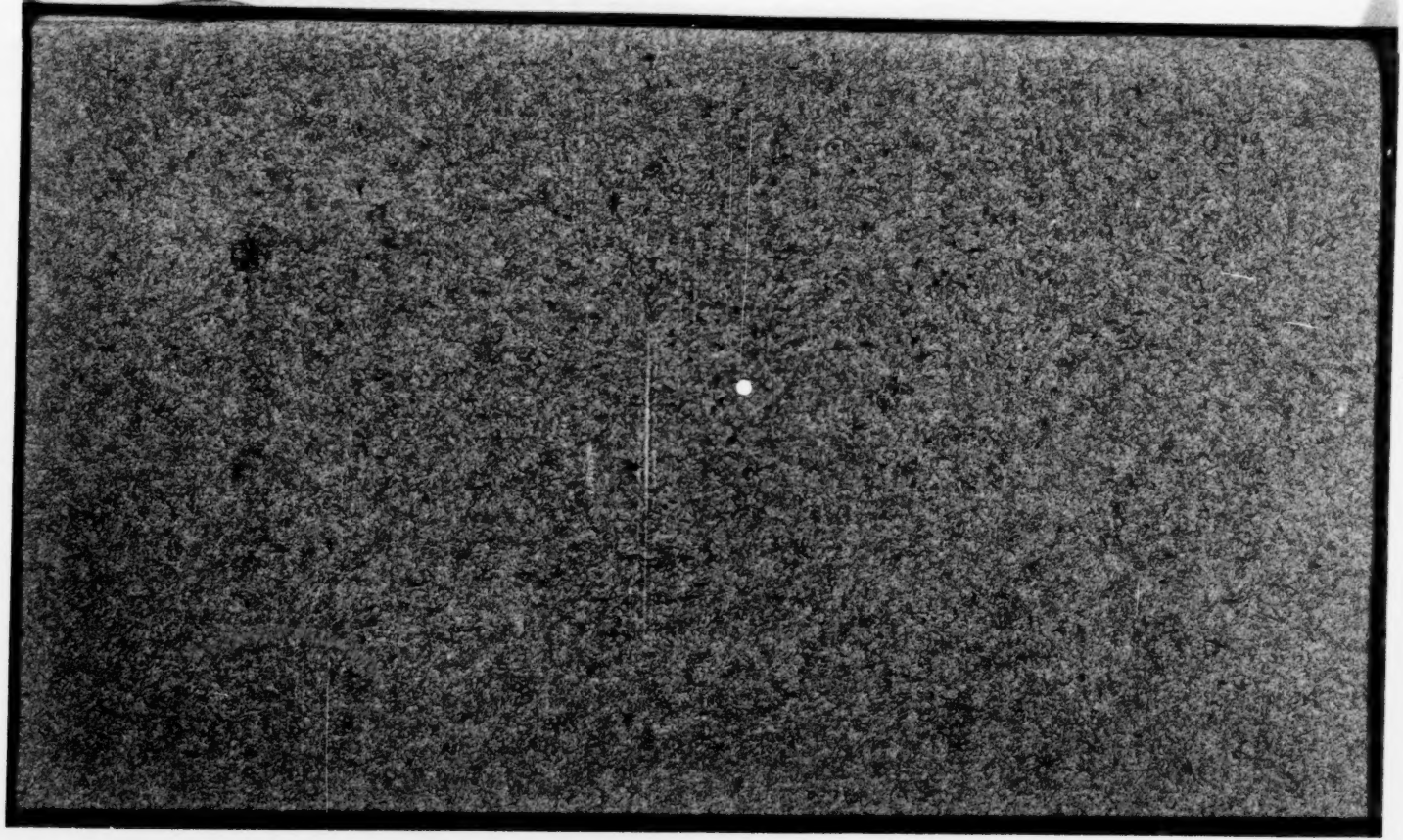
ANNIE BUCHSER, and W. W. ZENT, as Guardian ad Litem for HANS B. BUCHSER, ROLAND H. BUCHSER, and HILLMAN A. BUCHSER, Minors,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

APPELLEES' ANSWERING BRIEF.

FRANK T. POST,
JOHN SALISBURY,
B. D. ADAMS,
B. B. ADAMS, and
W. W. ZENT,
Solicitors for Appellees.



IN THE

Supreme Court

OF THE

United States

October Term, 1913.

No. 641.

JOHN R. BUCHSER,

Appellant,

vs.

ANNIE BUCHSER, and W. W. ZENT, as Guardian ad Litem for HANS R. BUCHSER, ROLAND H. BUCHSER, and HILLMAN A. BUCHSER, Minors,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

APPELLEES' ANSWERING BRIEF.

FRANK T. POST,
JOHN SALISBURY,
B. B. ADAMS,
B. B. ADAMS, *and*
W. W. ZENT,
Solicitors for Appellees.

SUBJECT INDEX.

CASES REFERRED

ARGUMENT.

The interests of all the appellees are identical, and for that reason all join in this brief, notwithstanding that each interposed separate demurrers in the Court below. The facts are all admitted. The only question before the Court is one of law.

It is the settled law of the State of Washington, where the property in controversy is situated, that the same is community property.

Kromer v. Friday, 10 Wash. 621.
Ahern v. Ahern, 31 Wash. 334.
Cox v. Tompkinson, 39 Wash. 70.
Hall v. Hall, 41 Wash. 186.
Cunningham v. Krutz, 41 Wash. 190.
Kreig v. Lewis, 56 Wash. 196.
Teynor et al., et ux., v. Heible et al., 133 Pac. 1, July 1st, 1913.
July 1st, 1913.

On page 11 of their brief, appellants quote copiously from the opinion in the last above cited case, but we believe that the following language taken from that part of the opinion quoted by appellant as aforesaid, without question establishes the law applicable to the case at bar in the State of Washington; that part of the opinion is as follows:

> "In other words, the rule should be that, in all cases where the marital relation does not exist at

> the time of the original settlement and entry and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land."

We also believe that the question has been settled in our favor by the decisions of the United States Supreme Court, and on that rule we rest our case as the same is set forth in the following decisions:

Wilcox v. McConnell, 38 U. S. 516.
McCune v. Essig, 199 U. S. 382.
Bernier v. Bernier, 147 U. S. 242.

In Wilcox v. McConnell, *Supra*, the Supreme Court of the United States says:

> "We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be solved by the laws of the United States; but that whenever, according to those laws, *the title shall have passed, then that property, like all other property in the state, is subject to the state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

To reverse the decision of the Court below would, in the language of Judge Rudkin, in sustaining the demurrers to complainant's petition:

> "Invite a system of litigation more portentious than our jurisprudence has yet known."

The rule announced and followed by the said Supreme Court has become a settled rule of property in the State

of Washington, and thousands of titles depend upon its maintenance. Having received this construction for so long a time by the Courts, it would seem that if the decisions are wrong the matter should be left to the legislature to correct.

We respectfully submit that the lower Court was right in sustaining the demurrers and dismissing the Bill of Complaint.

Respectfully submitted,

FRANK T. POST,
JOHN SALISBURY,
Solicitors for Annie Buchser,
503-4 The Rookery, Spokane, Washington.

and

B. B. ADAMS,
W. W. ZENT,
Solicitors and Guardian ad Litem for Appellees.
315 Jamieson Bldg., Spokane, Washington.

BUCHSER *v.* BUCHSER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 641. Submitted November 3, 1913.—Decided November 17, 1913.

Unless the statutes of the United States control, this court follows the state court as to whether real estate is separate or community property.

Until the title of an entryman is completed the laws of the United States control; but after completion the land becomes immediately subject to state legislation. *McCune* v. *Essig*, 199 U. S. 382.

Even if the United States could impress a peculiar character upon land within a State after parting with it, it would only be by clearly expressing it in a statute, which has not been done. *Wright* v. *Morgan*, 191 U. S. 55.

A state law that after completion of the entryman's title the property becomes community property is not like a contract for sale to a third party; but is consistent, and not in conflict, with the provisions of the act of March 3, 1891, prohibiting alienation of homestead entries.

The highest court of the State of Washington having held that immediately on completion of title of an entryman the property becomes community property, and that on the death of the wife after such completion her children have an interest therein, this court follows that decision.

202 Fed. Rep. 854; 121 C. C. A. 212, affirmed.

THE facts, which involve the construction and application of statutes of the State of Washington relating

to property acquired by an entryman under the laws of the United States, are stated in the opinion.

Mr. F. M. Dudley, *Mr. W. E. Cullen* and *Mr. David Herman* for appellant:

The lower court erred in holding that the State of Washington has uniformly held grants of the Federal Government under the homestead laws to be the community property of the entryman and his wife. *Bolton* v. *La Camas Water Co.*, 10 Washington, 246, held that the homestead was the separate property of the entryman. *Ahern* v. *Ahern*, 31 Washington, 334, holding otherwise, was disapproved in *Hall* v. *Hall*, 41 Washington, 186, and *Cunningham* v. *Krutz*, 41 Washington, 190.

Since the Circuit Court of Appeals rendered its decision herein, the Supreme Court of Washington has held these cases to be out of harmony and irreconcilable. *Teynor* v. *Heible*, 133 Pac. Rep. 1.

To allow the States to ignore Federal land laws, to interpret the grants made by the Federal Government and designate the persons who are the beneficiaries thereof according to their own local laws, brings about the anomalous situation of citizens of the United States holding different rights under grants issued by the Federal Government in pursuance of the same and identical laws, simply because one happens to live in one State and the other in another State. California, also possessing the community property law, has uniformly held that the homestead becomes the sole and separate property of the entryman. *Noe* v. *Cord*, 14 California, 577; *Wilson* v. *Castro*, 31 California, 421; *Wood* v. *Hamilton*, 33 California, 698; *Lake* v. *Lake*, 52 California, 428; *Harris* v. *Harris*, 71 California, 314; *Morgan* v. *Lones*, 80 California, 317.

The State of Washington has been vacillating and under certain conditions holds that the homestead is not the separate property of the entryman, but the com-

munity property of himself and his wife, and that one-half of the property belongs to her or her children, even if they are by a former husband.

The State cannot confiscate one-half of the entryman's grant by calling it the community property as that would be the taking of property without due process of law. If the Federal Government grants the homestead to the entryman himself personally, it becomes his separate property, and not the community property of himself and his wife.

The rights of a grantee from the Federal Government present a Federal question on which the decisions of the Federal courts are controlling, and in the administration of the Federal land laws the community system is unknown. *Phœnix Mining Co.* v. *Scott*, 20 Washington, 48; *Cunningham* v. *Krutz*, 41 Washington, 190; *Hall* v. *Hall*, 41 Washington, 186.

Each of the three cases last cited holds the grant from the Government to be the separate property of the entryman and grantee.

Congress alone has the power to enact laws for the disposition of the lands belonging to the United States. No State can abridge that right nor interfere with the grantee's enjoyment or possession of the lands granted by the Federal Government. *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92.

The Washington enabling act (§ 4) provides that the public lands shall remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

With the right to dispose of the public lands necessarily goes the right to protect the grants made by the Federal Government.

The wife has no interest in the lands entered by her husband whilst he is living. See §§ 2289, 2290, 2291, United States Comp. Stat. 1901.

A homestead acquired under the laws of the United

States is the sole and separate property of the entryman. Any other conclusion is inconsistent with the clear and explicit provisions of the United States statutes applicable to homestead entries. *Gibson* v. *Chouteau*, 13 Wall. 92; *McCune* v. *Essig*, 199 U. S. 382; *Hall* v. *Hall*, 41 Washington, 186.

Wilcox v. *McConnell*, 13 Pet. 496, 516, does not warrant the conclusion that after title has passed from the Federal Government the State can take one-half of the land from the grantee and give it to his wife by simply designating it as community property.

In this case there is no question of descent as the entryman is still living. The fact that the entryman's wife died cannot affect his individual and separate property, nor give the probate court any jurisdiction over the same.

Mr. Frank T. Post, *Mr. B. B. Adams*, *Mr. John Salisbury* and *Mr. W. W. Zent* for appellees:

It is the settled law of the State of Washington that the property in controversy is community property. *Kromer* v. *Friday*, 10 Washington, 621; *Ahern* v. *Ahern*, 31 Washington, 334; *Cox* v. *Tompkinson*, 39 Washington, 70; *Hall* v. *Hall*, 41 Washington, 186; *Cunningham* v. *Krutz*, 41 Washington, 190; *Kreig* v. *Lewis*, 56 Washington, 196; *Teynor* v. *Heible*, 133 Pac. Rep. 1.

See also the decisions of this court in *Wilcox* v. *McConnel*, 13 Pet. 516; *McCune* v. *Essig*, 199 U. S. 382; *Bernier* v. *Bernier*, 147 U. S. 242.

To reverse the decision of the court below would invite a system of litigation more portentous than our jurisprudence has yet known and upset thousands of titles which depend upon it. Having received this construction for so long a time by the courts, it would seem that if the decisions are wrong the matter should be left to the legislature to correct.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to quiet title, alleging that the plaintiff, a married man, made entry and acquired title to the land in question under the homestead laws of the United States by patent issued December 17, 1903; that thereafter his wife died, and that the defendants, the children of the marriage, claim an interest in the land. By the laws of the State of Washington, in which the property is situated, it became community property unless the statutes of the United States forbid. *Teynor* v. *Heible*, 133 Pac. Rep. 1. On that point we follow the Washington decisions. There was a demurrer, which was sustained by the District Court; *sub nom. Buchser* v. *Morss*, 196 Fed. Rep. 577, and by the Circuit Court of Appeals, 202 Fed. Rep. 854. 121 C. C. A. 212.

There is no doubt, of course, that until the title is completed the laws of the United States control. *Wadkins* v. *Producers Oil Co.*, 227 U. S. 368. *Bernier* v. *Bernier*, 147 U. S. 242. *Hall* v. *Russell*, 101 U. S. 503. *Gibson* v. *Chouteau*, 13 Wall. 92. But when the title has passed then the land 'like all other property in the State is subject to state legislation.' *Wilcox* v. *Jackson*, 13 Peters, 498, 517. *Irvine* v. *Marshall*, 20 How. 558, 564. *McCune* v. *Essig*, 199 U. S. 382, 390. If the United States could impress a peculiar character upon land within a State after parting with all title to it, at least the clearest expression would be necessary before such a result could be reached. *Wright* v. *Morgan*, 191 U. S. 55, 58. But it has not tried to do anything of the sort.

No one would doubt that this title was subject to the same incidents as any other so far as events subsequent to its acquisition were concerned. See *Wright* v. *Morgan*, *supra*. It could be lost by adverse occupation for the time prescribed by state law, and in a State that adopted the common law as to dower it would be subject to dower

if the settler subsequently married. The only semblance of difficulty is due to the coincidence in time of the acquisition of a separate right by the settler and the beginning of a community right in the wife. But this is by no means an extreme illustration of the division of an indivisible instant that is practiced by the law whenever it is necessary. A statute may give a man a right of action against another for causing his death, that accrues to him at the instant that he is *vivus et mortuus*. *Higgins* v. *Central New England & Western R. R. Co.*, 155 Massachusetts, 176, 179. In the present case the acquisition under the United States law is complete and that law has released its control before the state law lays hold, and, upon grounds in no way connected or interfering with the policy of Congress, brings the community regime into play. The special family relations thus created are not like contracts with third persons impliedly forbidden by the act of March 3, 1891, c. 561, § 5, 26 Stat. 1097, amending Rev. Stat., § 2290. They are consistent with the policy of the statute which is to enable the settler and his family to secure a home. See § 2291.

Decree affirmed.